LIBRARY
SUPREME COURT, U.S.
NOV 20 1951

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

**No. 390**

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A. K. M.,

*Petitioner,*

vs.

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION OF PETITIONER, HENRY M. PROPPER, ETC., FOR LEAVE TO FILE ANNEXED SECOND PETITION FOR RE-HEARING

A. WALTER SOCOLOW
*Attorney for Petitioner*

# INDEX


| | PAGE |
|---|---|
| Motion of Petitioner, Henry M. Propper, etc., for Leave to File Annexed Second Petition for Rehearing | 1 |
| Petitioner's Second Petition for Re-Hearing | 2 |
| Conclusion | 6 |
| Certificate Pursuant to Rule 33 | 6 |


CITATIONS

*Cases:*


| | |
|---|---|
| Bernstein v. N. V. Nederlandsche etc., 173 F. 2d. 71, 78 | 5 |
| DeGheest's Estate, In re, 360 Mo. 1002, 1006, 232 S. W. 2d. 370, 380 | 5 |
| Lyon v. Singer, 339 U. S. 841 | 2, 3, 5 |
| Todeva v. Oliver Iron Mining Co., 45 N. W. 2d. 782, 789 | 5 |
| Zap v. U. S., 330 U. S. 800 | 2 |
| Zittman v. McGrath, 341 U. S. 446 | 2, 3, 4, 5, 6 |
| Zittman v. McGrath, 341 U. S. 471 | 4 |


*Statutes and Miscellaneous:*


| | |
|---|---|
| Executive Order 8389 | 4 |
| United States Code, Title 28, §452 | 2 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A. K. M.,

*Petitioner,*

vs.

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION OF PETITIONER, HENRY M. PROPPER, ETC., FOR LEAVE TO FILE ANNEXED SECOND PETITION FOR RE-HEARING

Now comes the petitioner, Henry M. Propper, etc., by his attorney, A. Walter Socolow, and moves the Court for leave to file the annexed second petition for re-hearing and to recall the mandate heretofore issued herein.

Under §452 of Title 28 of the United States Code, this Court may entertain the annexed second petition for re-hearing.

Respectfully submitted,

A. WALTER SOCOLOW
Attorney for Petitioner
580 Fifth Avenue
New York, N. Y.

To paraphrase the *Zittman* case, the Custodian, by his right, title and interest order, acknowledged here that (341 U. S. 463),

> "if the interests acquired by the *state receivership proceeding* are valid as against *A K M* he [the Custodian] is not under the Vesting Orders involved, as he has chosen to phrase them, entitled to the *funds in dispute*, but he takes the position that no valid rights against *A K M* were acquired by the *receivership proceeding* because prohibited by the freezing program. He has, in short, put himself in the shoes of *A K M*." (Italicized matter substituted for portions of text of *Zittman* opinion).

The receivership proceeding against A K M—like the unlicensed attachment in *Zittman*—was good as against A K M. Of course, as in *Zittman*, petitioner could not possess himself of A K M's property until licensed to do so under Exec. Order 8389. However, the Custodian could not here—any more than in *Zittman*—defeat petitioner's rights, as receiver, by vesting the "right, title and interest" of A K M in the property comprehended by the receivership. Applicable here is this Court's holding in *Zittman* that rights acquired against blocked funds by litigation under New York law "cannot be cancelled or annulled under a Vesting Order by which the Custodian takes over only the right, title and interest of" the blocked national (341 U. S. 464).

This Court mistakenly decided this cause as though a *res* vesting order were involved when, in fact, only a *right, title and interest* order had issued. *Zittman*, No. 298, 341 U. S. 446,—not *Zittman*, No. 299, 341 U. S. 471—states the result applicable here.

On the facts, *as they were assumed to be*, the holding here squares with the *Lyon* and *Zittman* cases. On the facts *as they actually were*, the holding here conflicts with those cases. This anomaly has led to much misunderstanding of this cause. *In re DeGheests Estate*, 360 Mo. 1002, 1006, 232 S. W. 2d 378, 380; *Todeva* v. *Oliver Iron Mining Co.*, 45 N. W. 2d 782, 789; *Bernstein* v. *N. V. Nederlandsche, etc.*, 173 F. 2d 71, 78. On a re-hearing this cause can be squared with the *Lyon* and *Zittman* holdings.

## II

Petitioner was appointed temporary receiver of A K M prior to June 14, 1941, the date on which the controls were extended to Austrian nationals, of which A K M was one. It was conceded that, if, as temporary receiver, petitioner took title to A K M's property, he was entitled to prevail here against the Custodian. He did not prevail because this Court found that, under New York law, petitioner as temporary receiver took only the right to possession—not title. 337 U. S. 472, 486-9.

*Zittman* v. *McGrath, supra*, has since held precisely to the contrary. There this Court, speaking of the status of a temporary receiver appointed under the same statute as was petitioner, said (341 U. S. 460):

> "* * * Upon application by a creditor of such a corporation, the Court appoints a temporary receiver. *Title to all such assets vests in him upon appointment.*" (Emphasis supplied.)

A re-hearing should be had so that it may be finally determined whether, as temporary receiver, petitioner took title to the A S C A P debt, as held in *Zittman* v. *McGrath*,

or whether the contrary was the case as held in this cause. If, as temporary receiver, petitioner took title, the freezing controls were not in issue here and this cause should have been reversed.

## CONCLUSION

So long as the holding here stands, there will be confusion and uncertainty as to where the rule of this cause ends and the rule of *Lyon* and *Zittman* begins. The confusion should be eliminated on a re-hearing of this cause.

Respectfully submitted,

A. Walter Socolow
Counsel for Petitioner

### Certificate Pursuant to Rule 33

I, A. Walter Socolow, counsel for the within petitioner, do hereby certify that the foregoing petition is presented in good faith and not for delay.

A. Walter Socolow